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Supreme Court of the United States

OCTOBER TERM 1942

No. 850

Louis E. Ury,

Petitioner,

against

Moore-McCormack Lines, Inc.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

N. Sargeant Rosenberg,
Attorney for Petitioner.

INDEX

PAGE

PETITION 1

Summary of Facts 2

Jurisdiction of the Court 4

Questions Presented 4

Reasons Relied Upon for the Granting of the Writ 5

BRIEF 7

Opinions of the Court Below 7

POINT I—The determination of questions of fact is within the exclusive province of the jury, safeguarded by the Constitution of the United States 7

POINT II—The Trial Court properly excluded the alleged records which were unidentified, unauthenticated and uncertified, for which no proper foundation had been laid and which contained incompetent, irrelevant and hearsay statements 10

POINT III—The Circuit Court of Appeals erred in holding that defendant's cross-examination was unduly limited 18

POINT IV—The Circuit Court of Appeals improperly reversed the judgment on the count for maintenance and cure 20

POINT V—The order of the Circuit Court of Appeals should have provided that costs abide the event 24

CONCLUSION—For the reasons stated in the petition and this brief, it is respectfully requested that this application for a writ of certiorari be granted 25

MOTION TO WAIVE PRINTING 27

CASES CITED

PAGE

Alford v. United States, 282 U. S. 687, 694 19
Aloha, 1936 A. M. C. 764 9

Bainbridge v. Merchants & Miners Transp. Co., 287 U. S. 278 ..... 5, 24
Bardol, Matter of, 164 Misc. 907, aff'd 253 App. Div. 498, 278 N. Y. 543 15
Brashear v. Union, 104 F. (2nd) 762 21
Burns Mortgage Co. v. Fried, 292 U. S. 487 5

Dashnau v. City of Oswego, 204 App. Div. 189 8
Dougherty v. Milliken, 163 N. Y. 527 8
Dowling v. Jones, 67 F. (2nd) 537 ..... 16, 19

Elzig v. Gudwangen, 91 F. (2nd) 434 8
Erie R. R. v. Schleenbaker, 257 Fed. 667, cert. den. 250 U. S. 666 21

Fealey v. Bull, 163 N. Y. 397 8

Geroeami v. Fancy Fruit & Produce Corp., 249 App. Div. 221 15
Grant v. U. S. Shipping Board, 22 F. (2nd) 488 9
Grant v. U. S. Shipping Board, 24 F. (2nd) 812 24
Gunning v. Cooley, 281 U. S. 90 9

Hull v. Littauer, 162 N. Y. 569 9
Hunter v. Derby Foods, Inc., 110 F. (2nd) 970 ..... 8, 17

Johnson v. Lutz, 253 N. Y. 124 ..... 2, 15

Leversee v. Neidermyer, 219 App. Div. 214 8

Meyers v. Hines, 199 App. Div. 594 8
Minn. Steamship Co. v. Lehigh Valley Transportation Co., 129 Fed. 22 21

Needle v. N. Y. Railways Corp., 227 App. Div. 276 15

People v. Robinson, 273 N. Y. 438 15

PAGE

Roebling's Sons Co. v. Erickson, 261 Fed. 986, cert. den. 252 U. S. 585 22

Roge v. Valentine, 255 App. Div. 475 15

Southern Pacific Co. v. Raulston, 67 F. (2nd) 958 21

United States v. Chandler, 87 F. (2nd) 356 (5th Cir.) 5, 16

STATUTES CITED

Civil Practice Act of New York:
Sec. 374a 2, 15

Constitution of the United States, VII Amendment 9

Judiciary Code:
Sec. 240 4
Sec. 665 17
Sec. 837 ..... 5, 24

Rules of Civil Procedure for District Courts:
Rule 43a 18

United States Code:
Sec. 51, Title 45 22

U. S. C. A., Chap. 9 4

8 U. S. C. A. 399d 17
28 U. S. C. A. 347 4
28 U. S. C. A. 432a 15
28 U. S. C. A. 661 to 695 18
28 U. S. C. A. 695 ..... 2, 4, 15
28 U. S. C. A. 724 5
38 U. S. C. A. 11g 17
46 U. S. C. A. 688 22

Supreme Court of the United States

OCTOBER TERM 1940

No.

LOUIS E. ULM,

Petitioner,

against

MOORE-MCCORMACK LINES, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

Your petitioner, Louis E. Ulm, prays that a writ of certiorari issue to review the order of the United States Circuit Court of Appeals for the Second Circuit entered on January 28, 1941, reversing a judgment of the United States District Court for the Southern District of New York. The judgment was entered upon the jury's verdict in favor of the plaintiff in an action for damages for personal injuries sustained by him while aboard the SS. "Southfolk", upon which vessel he was employed as an able seaman. The Circuit Court ruled that the case was properly submitted to the jury for determination (115 F. [2nd] 492, 493), but reversed the judgment because certain unidentified, uncertified and unauthenticated hospital records were excluded from evidence by the Trial

Judge. The Trial Judge excluded these documents because no proper foundation had been laid for their admissibility and because there was no showing that the requirements of the Federal statute had been met. The Circuit Court reversed and its ruling involves the interpretation and effect of the recently enacted Federal statute (1936)—28 U. S. C. A., 695.

Upon a petition for rehearing, filed November 26, 1940, decided January 27, 1941, Circuit Judge Clark wrote a second opinion explaining the first. Respectfully the petitioner contends that the second opinion does not eliminate the erroneous legal conclusions contained in the first. If anything, it demonstrates the lengths to which the Circuit Court went in attempting to eliminate the proper logical inferences and legal deductions which were the only ones that could have been obtained from its first ruling.

The language of the Federal statute in question (28 U. S. C. A., 695) is identical with a New York State statute (C. P. A., Sec. 374a). The highest Court of the State of New York held that records such as those in question are not admissible (*Johnson* v. *Lutz*, 253 N. Y. 124). The Circuit Court sitting in the State of New York, interpreting the identical language of the Federal statute, held they were admissible despite the Conformity Act and the decisions of this Court (*Erie R. R.* v. *Tompkins*, 304 U. S. 64; *Vandenbare* v. *Owen-Illinois Glass Co.*, decided Jan. 6, 1941).

The major question presented on this petition, therefore, is the proper interpretation of a Federal statute, which is identical in language with a State statute—that latter having been interpreted by the highest Court of the State, the constitutionality of such statute as interpreted by the Second Circuit and the limitations which must be placed upon the admissibility of unsworn, hearsay statements under the so-called modern rules of evidence.

Summary of Facts

The plaintiff, a young man twenty-eight years of age, was employed by the defendant in the capacity of able seaman on December 18, 1939, and assigned to duty aboard the SS. "Southfolk". To get from the deck to the crew's quarters it was necessary to use a companionway ladder or staircase which was in an almost vertical position, running from the main deck to the deck below. The ladder was so poorly constructed as to be insecure and was not attached either at the top or bottom, except that it was held in place by an iron pipe railing. It is difficult to describe the structure itself. Plaintiff's Exhibit 4 is a fair representation thereof. Plaintiff's Exhibit 5 indicates that there were two light fixtures in the area of the companionway. One of these was never illuminated, as it had no bulb. The other, a small light located some distance from the ladder, was out at the time of the occurrence.

On December 24, 1939, the plaintiff, in his working clothes, joined the other members of the crew in the mess hall. At about 1 A. M. he and one Robbins were proceeding from the mess hall, which was located on the aft deck, to their sleeping quarters on the deck below, to turn in for the night. Because of the defective condition of the ladder and the lack of proper illumination, plaintiff fell. He received first aid treatment and early that morning was removed on a stretcher to the Marine Hospital, where the attending physician placed him on a plank bed in a private room. He remained confined to the hospital for seven weeks. While at the hospital during these first weeks he developed a cyanosis. His entire body turned blue. He was placed in an oxygen tent, where he remained for almost a week. His condition was so critical as to warrant notification by the hospital to his family that he was expected to die. After leaving the hospital, he was forced to return and again be confined to bed for an additional five weeks, making his total stay at the hospital over three months.

The case was submitted to the jury, who returned a verdict for $25,000 on the injury action and $10,000 on the maintenance and cure action, which was reduced by stipulation to $3,000.

On appeal, various errors were assigned by the defendant-appellant, all of which were found to be lacking in merit. The Circuit Court held that it was for the jury to determine the controversy, but reversed the judgment because of an alleged error with respect to the admissibility of the records.

Jurisdiction of the Court

The order of the Circuit Court of Appeals was made and entered on January 28, 1941.

The statutory provision under which the jurisdiction of this Court is invoked is 28 U. S. C. A., 347; Judiciary Code, Sec. 240 as amended; Chap. 9 of the Judicial Code and Judiciary and the rules of this Court.

The opinion of the Circuit Court is dated November 12, 1940. On November 26, 1940, and within the time allowed by the rules of the Circuit Court of Appeals, a petition for rehearing was filed. It was not decided until January 27, 1941, on which day it was denied. A second opinion was filed on January 27, 1941. On January 28, 1941, the order of reversal and the mandate of the Circuit Court of Appeals was filed.

Questions Presented

The first question presented is whether the Trial Court properly excluded records which were unidentified, unauthenticated, uncertified, and for which no proper foundation had been laid, and whether the provisions of Section 695 of 28 U. S. C. A. authorize the admission of such records with or without the formalities as set forth by the statute, being complied with.

Secondly, whether there was any ground for the reversal of the action for maintenance and cure on which an award was made to the plaintiff and whether a new trial, if warranted, should not have been directed as to the issue of damages alone in the negligence suit.

Third, whether costs may be imposed upon a seaman in the face of the provisions of Section 837 of the Judiciary Code and the decision of this Court in *Bainbridge* v. *Merchants & Miners Transp. Co.*, 287 U. S. 278.

Reasons Relied Upon for the Granting of the Writ

1. The Circuit Court has made a decision in direct conflict with the decisions of the New York State Court of Appeals involving the interpretation of an identical statute, with the result that confusion is created on an important question of the admissibility of evidence, a question which arises daily in the trial of many lawsuits in the State and Federal courts of this district.

2. The Circuit Court for the Second Circuit has made a decision which directly conflicts with the decision of the Circuit Court for the Fifth Circuit on the interpretation of the identical Federal statute (*United States* v. *Chandler*, 87 F. [2nd] 356 [5th Cir.]).

3. The Circuit Court of Appeals for the Second Circuit has made a decision which is contrary to the letter and spirit of the Conformity Act, 28 U. S. C., 724 (*Burns Mortgage Co.* v. *Fried*, 292 U. S. 487).

4. The Circuit Court of Appeals has erroneously interpreted the Federal statute, thereby establishing a dangerous precedent and thereby overruling all previously conceived ideas respecting the admissibility of documentary evidence.

5. The Circuit Court for the Second Circuit has made a ruling which violates the constitutional provisions respecting due process. It is universally recognized that what some person said outside the court room, either orally or in writing, when not under oath is not admissible in evidence to establish a fact.

Were the rule of the Circuit Court in this case followed to its logical conclusion, then anything that anybody said in any record, made anywhere, is properly admissible in evidence without a showing as to where the records came from, where they were kept or how they were kept, and the burden shifts to the opposite party to explain the contents of said writing.

WHEREFORE, your petitioner respectfully prays that this petition for a writ of certiorari to review the order of the Circuit Court for the Second Circuit be granted.

LOUIS ULM,
Petitioner,
By JOSEPH S. ROBINSON,
Counsel for the Petitioner.

Supreme Court of the United States

OCTOBER TERM 1940

No.

LOUIS E. ULM,

Petitioner,

against

MOORE-McCORMACK LINES, INC.,

Respondent.

BRIEF IN SUPPORT OF PETITION

Opinions of the Court Below

The opinion of the Circuit Court of Appeals reversing judgment for the plaintiff is reported in 115 F. (2nd) 492. The opinion of the same Court denying the petition for rehearing, dated January 27, 1941, is attached to the record.

POINT I

The determination of questions of fact is within the exclusive province of the jury, safeguarded by the Constitution of the United States.

The determination of issues of fact and reasonable inferences deducible therefrom is within the sole province of the jury. The right to a jury's verdict depends upon the

credibility of witnesses, and their findings should be conclusive unless the testimony is insufficient as a matter of law (*Fealey* v. *Bull,* 163 N. Y. 397; *Hunter* v. *Derby Foods,* 110 F. [2nd] 970; *Elzig* v. *Gudwangen,* 91 F. [2nd] 434; *Dougherty* v. *Milliken,* 163 N. Y. 527). A jury's verdict cannot be set aside and a reversal must be justified in the record on some other grounds than that the Court does not agree with the jury in its verdict (*Leversee* v. *Neidermyer,* 219 App. Div. 214; *Dashnau* v. *City of Oswego,* 204 App. Div. 189). In *Meyer* v. *Hines,* 199 App. Div. 594, the Court stated:

> "When the right to a verdict depends upon the credibility of witnesses, and the testimony is not incredible or insufficient as a matter of law, the question of fact is for the jury, and their finding is conclusive."

The following is an excerpt from the Circuit Court of Appeals opinion of November 12, 1940:

> "On this appeal defendant argues vigorously that there was no evidence of negligence to be submitted to the jury, *but the evidence of lack of light in the companionway and that the ladder was not secure at its foot, seems to us to justify such submission.*"

Having decided that the issues relating to the accident—negligence, contributory negligence, the manner of the happening and the extent of injury—were properly submitted to the jury, the Circuit Court of Appeals nevertheless in its second opinion of January 27, 1941, makes this statement: "but the errors concern not only the extent of plaintiff's injury but also whether he suffered any accident at all on shipboard."

The defendant at page 10 of its brief stated: "The ladder was obviously steep, the treads were about a foot apart and the ladder was *not* secured to the deck at the bottom. *There was no controversy on those subjects.*"

Defendant had also admitted the existence of the defective condition at the conclusion of the evidence at the trial (f. 1290). The argument later made that these defects were not the proximate cause of the accident is properly directed to the jury and not to the appellate court (*Grant* v. *U. S. Shipping Board,* 22 F. [2nd] 488; *Aloha,* 1936 A. M. C. 764).

The defendant did not produce a single witness of the large crew aboard its vessel to contradict the testimony of the plaintiff and his several witnesses. The only witness for the defendant on the happening of the accident was a dockmate who testified that when he arrived at the scene he found plaintiff lying on the deck at the foot of the ladder from which he had fallen, "apparently unconscious" (f. 987).

The keynote of defendant's defense was that plaintiff, having previously been convicted of crime, was unworthy of belief, that he had two strikes on him in advance of trial, and the jury could therefore under no circumstances find in his favor. The credibility of a witness or a party, however, is nevertheless a question of fact for the jury's determination (*Hull* v. *Littauer,* 162 N. Y. 569).

It is the general rule of law in all our courts that the verdict of a jury is not lightly to be set aside and that when reasonably within its province the jury's finding is conclusive. Any usurpation of this rule is a violation of the United States Constitution (VII Amendment).

Where reasonable-minded men may honestly differ on disputed facts, the questions are solely for the jury (*Gunning* v. *Cooley,* 281 U. S. 90). The Circuit Court said that the case was properly submitted to the jury for determination (115 F. [2nd] 492, 493,) but in its second opinion seems to have taken a different view. Plaintiff respectfully contends that the jury's findings are controlling and that the only legal question presented relates to the admissibility of the records.

POINT II

The Trial Court properly excluded the alleged records which were unidentified, unauthenticated and uncertified, for which no proper foundation had been laid and which contained incompetent, irrelevant and hearsay statements.

During cross-examination of the plaintiff, defendant's counsel picked up some papers and offered them in evidence with his own voluntary statement that they were the Chelsea Marine Hospital records. They were excluded as not the best evidence, not subject to cross-examination, not records of the United States and because no foundation was laid for their reception. They were marked Defendant's Exhibit C for Identification (f. 591). Later on, at folio 608, the Court reminded defendant's counsel to take exception and the following occurred:

> "Mr. Crawley: Well, I imagine your Honor's rulings must be correct.
>
> The Court: Oh, no, don't imagine that. Only the United States Supreme Court's ruling must be correct. There is no higher court above that" (f. 609).

At folio 819 defendant's counsel, during the cross-examination of a plaintiff's witness, asked to mark a paper which he described as an abstract of a Galveston Marine Hospital record for identification and never offered it in evidence. It was marked Defendant's Exhibit D for Identification. Defendant, on appeal, claimed it was error to exclude it.

At folio 955 defendant's counsel, while cross-examining a Stapleton Marine Hospital physician produced by plaintiff, offered in evidence two sheets of paper marked for Identification Defendant's Exhibit F. The handwriting on the sheets (purportedly part of the entire Stapleton Hospital record) was identified as in the handwriting of a

Dr. Edwards, who was still at the hospital (f. 956). This doctor was not produced by defendant and the two sheets were excluded.

The following took place with reference to Defendant's Exhibit G for Identification:

> "Mr. Crawley: The clinical record of the United States Marine Hospital at Stapleton, Staten Island, covering the period of the plaintiff's first hospitalization; mark that, please, for identification, and I offer that in evidence, of course. I understand your Honor's ruling.
>
> Mr. Harrington: Is there an offer in evidence?
>
> Mr. Crawley: Yes.
>
> Mr. Harrington: If there is, I object to it on the ground that no proper foundation has been laid for it.
>
> The Court: Sustained" (ff. 962-964).

(The papers so marked appear to be only a small portion of the alleged *second* Stapleton Hospital record.)

Defendant's counsel described a group of papers as a Galveston Marine Hospital record produced pursuant to a subpoena, which he offered similarly in evidence. They were excluded for lack of proper foundation and marked Defendant's Exhibit H for Identification.

The Circuit Court of Appeals, in referring to the offer of the Chelsea Hospital record, stated (115 F. [2nd] at p. 494): "Defendant then cited 28 U. S. C. A. § 661 providing for the admission of public records of the United States properly authenticated by certification and seal—*formalities lacking here.*" And further (p. 494): "Later, the offer of the Chelsea Hospital record was renewed (counsel having previously partly acquiesced in the court's ruling by saying that *he supposed the court must be right* * * *."

In referring to the Galveston Hospital records, the Circuit Court of Appeals stated in its opinion at page 496: "although the inference from this evidence, without other supporting proof, is perhaps too limited to justify reversal on this ground alone."

The foregoing would seem to indicate that the only question with relation to the exclusion of hospital records refers to the two Stapleton Hospital records, since obviously the formalities of authentication and certification are lacking with reference to the Chelsea record and the inference deducible from the Galveston record is too limited to be acceptable.

As to the Stapleton records, the Court below stated (p. 495):

> "Indeed, it is difficult to see why plaintiff's counsel should dare jeopardize a possible verdict (one of most substantial amount, as it turned out) by seeking exclusion of records so directly in point as were the Stapleton records, involving the hospital treatment for the very accident in suit."

The significance of this statement is that it prompts a litigant to prefer secondary evidence over the best evidence. It suggests that a plaintiff, in order to establish the extent and nature of his injuries in a given case, rely on the hospital record rather than the testimony of the hospital physicians, and this despite the fact that the fundamental rules of evidence are predicated upon the opportunity of an adversary to cross-examine a witness rather than accept recorded statements with finality. Indeed, the plaintiff in the instant case did not dare jeopardize a possible verdict by the simple expedient of producing and offering a hospital record in lieu of competent medical testimony which the defendant had the opportunity to cross-examine.

One of the Stapleton records was purportedly a complete clinical record of plaintiff's first stay at the hospital, while the other was merely an alleged admission note relating to his second admission to the same hospital. As to the question of identification, it must be noted that there was no concession by plaintiff's counsel at the trial that any of the records other than the Galveston record was produced pursuant to subpoena. It was persistently contended that no proper foundation for the receipt of any of the

records had been laid. Throughout the trial and the appeal to the Court below it was urged that the proffered records lacked identification, authentication and/or certification. The Circuit Court of Appeals, however, in its second opinion stated:

> "Plaintiff's concession that the records were produced by subpoena to their custodian was only one of the several indicia of authenticity upon which we relied."

And further, with reference to the two Stapleton records:

> "The necessary requisites of admissibility were amply proven by the two hospital internes offered as witnesses by the plaintiff himself."

Even if it were conceded that these records were produced pursuant to subpoena by the custodian named therein, the necessary prerequisites of identification, authentication and certification would not have been obviated. The voluntary remarks of defendant's counsel were incompetent to identify them.

The Court below indicates that because a physician who is in court and identifies such entries as he himself made and uses the same to refresh his recollection, his mere characterization of certain other entries as those of another hospital physician not in court entitles the record, even though several other handwritings appear, to be received in its entirety. This is a strange departure from established rules of evidence. And even under the new statute, the formalities required are dispensed with.

The Circuit Court of Appeals in its second opinion appears to be apprehensive lest its decision be misunderstood as a precedent. Yet this startling departure from established rules of evidence can hardly have any other effect. If the rule were as the Circuit Court would seem to indicate, then in any case wherein hospitalization results the plaintiff need produce no medical testimony, but offer the hospital records as proof of injury upon the mere identification by

himself or his counsel that he was the patient referred to in the records. The door to fraud as respects both private and public hospital records would indeed be open wide. No doctor need be produced to testify under oath. Friendship between patient and nurse or patient and physician, even the defendant and physician, or other reasons may cause records to be created which either the plaintiff or defendant may produce and which, under the Circuit Court's ruling, must be demonstrated to the jury. The time-honored right of cross-examination is gone—records cannot be cross-examined.

Nowhere in the record on appeal is there an iota of competent evidence on the part of the defendant's counsel even attempting to lay a foundation for the receipt of these records. No witness was called to show what was the regular course of business. Nevertheless the Circuit Court of Appeals in its later opinion described these records in detail as to printed form, directions, procedure, contents and all the other elements of regular entries, none of which was even attempted by defendant's counsel, and concludes that these necessary questions were not formally asked, "obviously due to the fact that nobody thought to go through the 'idle form of articulating the obvious' ". Was it plaintiff's obligation, perchance, to help defendant try its case?

In its earlier opinion the Circuit Court of Appeals excused defendant's lack of proper foundation with the comment, "it is true that the defendant's offerings were somewhat clumsily made" (115 F. [2nd] 494). Where, then, were the several other indicia of authenticity upon which the Court relied in its second opinion? The record reveals none. And the fact that the papers themselves had markings where certain entries were to be made does not by any stretch of the imagination indicate that they were so made, or that the entrant had knowledge of the facts, or that they were kept in regular order, or any of the other requirements set forth in the statute

The Circuit Court of Appeals invokes 28 U. S. C. A., Section 695, as a basis for its ruling, yet characterizes plaintiff's technical objections as to the absent prerequisites as "actually of no real substance". It follows, then, that the statute prescribing the regular entries rule is ineffectual and of no real substance. The plaintiff on appeal below cited Section 374a of the Civil Practice Act of the State of New York and the decisions following its enactment (*Johnson* v. *Lutz*, 253 N. Y. 124; *People* v. *Robinson*, 273 N. Y. 438; *Geroeami* v. *Fancy Fruit & Produce Corp.*, 249 App. Div. 221; *Roge* v. *Valentine*, 255 App. Div. 475; *Needle* v. *N. Y. Railways Corp.*, 227 App. Div. 276) and pointed out its similarity to 28 U. S. C. A., Section 695. Both of these enactments are in contravention of common law and must be strictly construed (28 U. S. C. A., Sec. 432a; *Johnson* v. *Lutz*, 253 N. Y. 124). Changes in common law rules of evidence must be strictly construed.

"It is a general rule that a statute in derogation of common law is strictly construed to the end that the common law system be changed only insofar as the words of the statute require. It is presumed that the legislature intended to make no innovation upon common law rights further than the case requires" (*Matter of Bardol*, 164 Misc. 907, aff'd 253 App. Div. 498, 278 N. Y. 543).

The Circuit Court of Appeals deemed the New York cases cited by the plaintiff inapplicable and concluded (115 F. [2nd] at p. 495):

> "Here the records were *claimed* primarily to show direct observation made by attending physicians, not entries of opinions."

The record is utterly silent as to by whom these claims were made and, if made, whether by persons having knowledge thereof, etc. Yet the Circuit Court of Appeals has excused such failure and now established precedent which appears to be directly contrary to the language of the statute. It is contrary to the rulings of the New York

State courts and contrary to its own earlier ruling in *Dowling* v. *Jones,* 67 F. (2nd) 537, and that of the Fifth Circuit in *United States* v. *Chandler,* 87 F. (2nd) 356. For the Circuit Court of Appeals to supply the missing deficiencies by its decision in describing the contents of the objectionable records is wholly improper and unwarranted and in itself error. Nor should a court slur over these absent prerequisites by treating them as "idle forms of articulating the obvious".

If the plaintiff's doctors who testified at the trial were in error concerning their recollections, the defendant could have used the hospital records, or any object, for that matter, to refresh their recollections or assail their credibility. If the testimony of these doctors was inconsistent with any of the other entries in the records in the handwriting of any other doctors, the latter were equally available to the defendant. The defendant could experience no difficulty in producing the absent physicians whose entries in the record it sought to elicit. The Stapleton Hospital was only five miles from the court. Defendant, however, was content to exhaustively cross-examine the witnesses produced on behalf of the plaintiff and to adopt a short-cut in its attempt to controvert their testimony by improperly offering incompetent and irrelevant secondary evidence, the records for which it did not even attempt to lay any foundation.

The Circuit Court of Appeals in its later opinion hesitates to uphold the exclusion of the hospital records as "supporting a trap for the unsuspecting" defendant. The reasoning behind this conclusion is more difficult to follow. The record on appeal reveals that the defendant obtained the deposition of a Massachusetts physician (Dr. Bloomberg) which was read to the jury on the trial. There was no impediment to the depositions of any of the doctors located in near or distant places if they could not be at the trial. The defendant, however, preferred not to resort to this known means of procedure. It chose to adopt the line of least resistance by offering records without founda-

tion or proper authentication, identification and certification. What trap and set by whom? Equally not understandable is the Court's reference to plaintiff's objection as being "technical" and as being an "afterthought". Counsel for the plaintiff specified at the trial whenever defendant's "clumsy" offer of proof was made that no proper foundation had been laid and that there was no compliance with the statute. If that is being technical then all rules of evidence might well be abolished. If making objection and specifying the grounds thereof at the moment the offer is made is indicative of an "afterthought", then it is difficult to understand what the Circuit Court would have regarded as timely. It is because a jury's determination has been vacated on grounds such as these that we respectfully ask for review by this Court.

In every case cited by defendant below a proper foundation had been laid and the records were admitted under specific statutes. These were the Alien and Citizenship Law (8 U. S. C. A., 399d), Veterans Administration Law (38 U. S. C. A., 11g), the Treasury Department and the various other specific executive branches of government (Judiciary Act, Sec. 665). The Circuit Court of Appeals in 115 F. (2nd) 495 referred to its own decision in *Hunter* v. *Derby Foods, Inc.*, 110 F. (2nd) 970, where it states the Court "supported a broad interpretation of this Statute justifying the admission of a coroner's certificate embodying an opinion or conclusion as to ground or cause of death of deceased, even though the New York precedents might cast a doubt on this conclusion." However, it appeared that the certificate in question was shown to have been duly recorded and certified, made and kept by a State official who had knowledge of the facts; the author himself was shown to have performed the autopsy; it was established that the records were kept in the regular course of business and it was the duty of the entrant to record the contents. None of these statutory requirements were shown or attempted in the case at bar. Furthermore, it would seem that the Congress of the United States would have specifi-

cally included hospital records if it were intended to characterize them as formal Government records within the provisions of 28 U. S. C. A., 661 to 695, or Rule 43a of Rules of Civil Procedure for District Courts.

It is the contention of the petitioner that to allow records made by someone outside the court room to be introduced in evidence without a strict showing of the formalities set forth in the statute is a violation of the due process clause of the United States Constitution. A statute which permits the introduction of documentary evidence upon a showing of compliance with certain formal requirements is in itself substantially in derogation of common law and of doubtful constitutionality. When, however, a court goes even further and holds that records are admissible even without a showing of the formalities required by statute, the admissibility of documents under such circumstances is so far afield from the established rules of evidence as have been recognized for centuries that it may be reasonably said it violates the due process clause.

Under the so-called modern rule of evidence as interpreted by the Circuit Court in this instance no one need be produced to testify as to the method or manner of keeping the records. All that has to be done is for counsel to state he has subpoenaed a record, and if a record indicates that it has entries it may be interpreted as having been made in the regular course of an occupation and those records become admissible. No one has sworn to them; no one has testified as to the knowledge of the entrant; no one knows when the entries were made; no one is in court to be cross-examined concerning them. Evidence not under oath is before the triers of the facts and the party against whom it is offered must sit idly by while his rights are to be determined by testimony not under oath and by something that someone said outside the court room. We maintain that such precedent is dangerous. We maintain that the reasoning in both the opinions of the Circuit Court of Appeals are without legal foundation.

We respectfully ask this Court to review the entire subject matter.

POINT III

The Circuit Court of Appeals erred in holding that defendant's cross-examination was unduly limited.

In its earlier opinion on appeal the Court below cites "one instance where we think the restriction prejudicial" (115 F. [2nd] at p. 496). It held that the Trial Court should have permitted defendant's counsel in cross-examining one of plaintiff's physicians, to test the doctor's conclusion with an abstract (a one-half-page summary of a purported record) of an unidentified hospital record which was never even offered in evidence. The Circuit Court stated: "But the abstract was nowhere offered in evidence; it was used only as a ground for asking the doctor a pertinent question" (115 F. [2nd] 496). The abstract itself has been held inadmissible (*Dowling* v. *Jones,* 67 F. [2nd] 537).

In its opinion denying the petition for rehearing, however, the same Court refers to defendant's extensive cross-examination. There it says, in referring to the testimony of Dr. Rawlings: "Then the witness was extensively examined and cross-examined in the light of his own entries in the hospital records which were used to refresh his recollection."

> "The extent of cross-examination with respect to an appropriate subject of inquiry is within the sound discretion of the trial court. It may exercise a reasonable judgment in determining when the subject is exhausted (Storm v. United States, 94 U. S. 76, 85; Rea v. Missouri, 17 Wall. 532, 542-3; Blitz v. U. S. 308, 312)."
>
> *Alford* v. *United States,* 282 U. S. 687, 694.

The use of a paper to refresh a witness' recollection does not authorize its admission in evidence and its exclusion does not constitute an unfair limitation of cross-examination.

Like Tennyson's "brook", defendant's counsel proposed to "go on and on" in the cross-examination of plaintiff as to his early record of convictions. Defendant could not dwell on this subject indefinitely without experiencing the reasonable judgment of the Trial Court in determining when the subject was exhausted. An examination of the record will reveal that there was no improper limitation on the defendant's right to cross-examination.

POINT IV

The Circuit Court of Appeals improperly reversed the judgment on the count for maintenance and cure.

The petition for rehearing and modification was filed in November, 1940. A severance of the maintenance and cure count was requested and prayer for affirmance of that judgment made. After considering this petition for over two months, the Court, on January 27, 1941, blandly decided with reference thereto: "Plaintiff also asks for severance of the case to uphold the recovery on the count for maintenance and cure and to allow retrial only on the issue of damages. But the errors concerned not only the extent of the plaintiff's injury but whether he suffered any accident at all on shipboard."

On the appeal from the judgment the defendant acknowledged the defective condition complained of, raised no question about the happening of the accident itself, except to impugn the character of the plaintiff in its concentrated effort to convince the jury that the plaintiff was unworthy of belief. The same arguments contained in its brief on appeal were made by its counsel in summation to the jury. The jury, however, resolved the questions of fact in favor of the plaintiff. The defendant thereafter took the position that the appeal was nothing more than a retrial of these issues. A trial de novo may be a proper characteristic of an appeal in an admiralty cause (*Minn. Steamship Co.* v.

Lehigh Valley Transportation Co., 129 Fed. 22; *Brashear* v. *Union*, 104 F. [2nd] 762), but certainly is improper on appeal in civil jury cases. The Circuit Court of Appeals, as reflected by its two opinions in the case at bar, has evidently considered the instant case as an admiralty case, otherwise it would not lightly disturb the conclusive findings of the jury and cast a doubt upon the happening of the accident and the fact of injury.

From the evidence and the testimony in the record there can be no question that plaintiff met with injury while aboard the defendant's vessel, as the jury found. The testimony is uncontroverted that immediately following plaintiff's fall he was rendered unconscious and removed to the hospital, where he remained for three months, during which time he was unable to work. On the appeal defendant made no argument against the propriety of the judgment on the maintenance and cure count and the Circuit Court of Appeals made no discussion or determination thereon. Whether plaintiff's inability to work was the direct and proximate result of the accident was a question solely for the jury (*Erie R. R.* v. *Schleenbaker*, 257 Fed. 667, cert. den. 250 U. S. 666; *Southern Pacific Co.* v. *Raulston*, 67 F. [2nd] 958). The defendant on the appeal and in opposition to the petition for rehearing urged that "whether any accident or injury to the plaintiff had actually occurred bore directly upon the subject of plaintiff's credibility on every issue" (defendant's brief on petition for rehearing, p. 2, and defendant's brief on appeal, p. 21). The question of the plaintiff's credibility, however, was properly submitted by the Trial Judge to the jury and the jury has already determined that the accident was the proximate cause of the plaintiff's injuries and his inability to work.

In its brief in opposition to the petition for rehearing the defendant for the first time raised the question that the alleged Stapleton Hospital admission note of Dr. Beardsley, who himself was a patient in the hospital at

the time, refuted plaintiff's story of his fall because, as it contended, plaintiff bore no external signs of injury upon his original admission to the hospital. No attempt to take the deposition of Dr. Beardsley before the trial was ever made by the defendant—a course which would have been proper and enabled plaintiff's counsel to cross-examine the doctor. As a matter of fact, this exhibit, which was properly excluded, did not even contain such statement. The Circuit Court of Appeals erroneously interpreted its content as revealing no external injury because, among other things, it described the plaintiff "who was lying quietly in bed, but unable to walk because of a pain in his back and he does not appear acutely ill". The same alleged admission note contains Dr. Beardsley's impressions as follows, "Lumbar strain, fractured nose, fractured coccyx(?), concussion of the brain"; and includes a history of a fall down a ladder followed by unconsciousness and removal to the hospital by stretcher. We quote from this objectionable record not in any way to acknowledge that it should have been received in evidence but merely to point out that the defendant and the Circuit Court of Appeals have misinterpreted its contents.

Under the Jones Act a seaman who sustains injuries in the course of his employment may maintain an action for damages at law and is entitled to receive the benefits of the statutory extensions of the common law rights and remedies of railroad employees. In addition thereto, the injured seaman has a claim for maintenance and cure and both actions may be united in one complaint (*Roebling's Sons Co.* v. *Erickson,* 261 Fed. 986, cert. den. 252 U. S. 585).

The effect of 46 U. S. C. A., 688 is to entitle an injured seaman to all the benefits provided by Section 51, Title 45 of the United States Code, which in effect allows him compensation during the period of disability. The underlying principle is the shipowner's obligation to maintain the seaman during the period when he is unable to care for himself. In the instant case the jury made an award to the plaintiff based upon that obligation of the shipowner.

The Circuit Court of Appeals opinion on reversal in no way affected the maintenance and cure action and the judgment on that count should have accordingly been affirmed. This would be so even if there were some question of negligence or contributory negligence.

The Circuit Court of Appeals, having determined that the issue of negligence was properly submitted to the jury, stated in its opinion (115 F. [2nd] at p. 493):

> "* * *; but the evidence of lack of light in the companionway and that the ladder was not secure at its foot seems to us to justify such submission. * * * Of the several rulings of the court at the trial assigned for error, those involving the exclusion of certain hospital records seem to us *decisive* of the appeal."

No reference whatsoever was made by the Circuit Court of Appeals to the judgment on the maintenance and cure count. Furthermore, there is no basis whatsoever in the record for the statement contained in that Court's second opinion of January 27, 1941:

> "The two Stapleton records are the vitally important ones, for they contain the observations of the admitting doctors that plaintiff showed no external injury after the alleged accident."

Not only is the record replete with medical testimony establishing objective injury, including fracture of the nose (f. 812), fracture of the coccyx (f. 895) and injury to the back, but it establishes an organic brain injury and the resultant neurological defects which have rendered the plaintiff a physical and neurological derelict (ff. 474-476, 917, 926-927). Defendant produced no doctors from the Stapleton Hospital, although such doctors were available for the trial, and neither the defendant nor the Circuit Court of Appeals can deduce from the two alleged Stapleton records or any other records, in the face of the jury's determination, that the injury did not proximately result from the accident.

POINT VI

The order of the Circuit Court of Appeals should have provided that costs abide the event.

Section 837 of the Judiciary Act reads as follows:

> "**Suits by seamen without prepayment of or bond for costs.** Courts of the United States, including appellate courts, hereafter shall be open to seamen, without furnishing bonds or prepayment of or making deposit to secure fees or costs, for the purpose of entering and prosecuting suit or suits in their own name and for their own benefit for wages or salvage and to enforce laws made for their health and safety (July 12, 1917, c. 27, Sec. 1, 40 Stat. 157; July 1, 1918, c. 113, Sec. 1, 40 Stat. 683)."

The United States Supreme Court in *Bainbridge* v. *Merchants & Miners Co.*, 287 U. S. 278, held that the above-quoted section of the Judiciary Act applies to all costs, whether in the court of original jurisdiction or the appellate court, and that it applies to actions of this kind. See also: *Grant* v. *U. S. Shipping Board*, 24 F. [2nd] 812. To impose costs upon this plaintiff as a condition precedent to his prosecuting the action would be tantamount to denying him relief entirely, since obviously an injured unemployed seaman cannot pay costs. To hold otherwise would make non-effectual the well-established rule that seamen be dealt with as a "favored class" (*Bainbridge* v. *Merchants & Miners Co.*, 287 U. S. 278, 282).

CONCLUSION

For the reasons stated in the petition and this brief, it is respectfully requested that this application for a writ of certiorari be granted.

JOSEPH S. ROBINSON,
ARTHUR S. GALES,
Counsel for Petitioner.

N. SINCLAIR ROBINSON,
Attorney for Petitioner.

PETITION FOR LEAVE TO HAVE APPEAL HEARD ON CERTIFIED RECORD OF CIRCUIT COURT OF APPEALS WITHOUT REPRINTING SAME

To the Honorable Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

Your petitioner, LOUIS E. ULM, prays that in the event the writ of certiorari herein applied for, is granted, that an order be entered permitting the appeal to be heard upon the certified record of the Circuit Court of Appeals.

Your petitioner is a seaman and has no funds with which to pay for the printing of the record. Your petitioner has no money or property of any kind. Nor is he employed.

It is respectfully prayed therefore that in the event the petition for certiorari is granted that the appeal be heard upon the records of the Circuit Court of Appeals filed on the application for certiorari.

LOUIS E. ULM,
Petitioner,

By: JOSEPH S. ROBINSON,
Counsel for Petitioner.

(24)

FILED
APR 7 1941
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1940

No. 850

LOUIS E. ULM,

Petitioner,

against

MOORE-McCORMACK LINES, INC.,

Respondent.

MEMORANDUM IN OPPOSITION TO THE PETITION FOR CERTIORARI

JOHN C. CRAWLEY,
for the Respondent.

INDEX.

	PAGE
Preliminary Note	1
Facts	2
Controlling factual considerations	4
Evidence regarding grounds of reversal	5–10
Decision of the Circuit Court of Appeals	12
Direct New York authority	13
Clinical records were admissible on many grounds	14
Purported questions are not actually involved	16

CASES CITED.

	PAGE
Andrea F. Luckenbach (The), 78 F. (2d) 827	14
Budka v. City of Schenectady, 256 App. Div. 764	2, 13, 15
Borucki v. MacKenzie Brothers Co., Inc., 125 Conn. 92	15
Chesapeake & Delaware Canal Co. v. U. S., 250 U. S. 123	15
Evanston v. Gunn, 99 U. S. 660	15
Hethier v. Johns, 233 N. Y. 370	7
Hunter v. Derby Foods, Inc., 110 F. (2d) 970	12
Geroeami v. Fancy Fruit and Produce Corp., 249 App. Div. 221	15, 17
Gilmore v. United States, 93 F. (2d) 774	15
Johnson v. Lutz, 253 N. Y. 124	2, 16
Long v. United States, 59 F. (2d) 602	14
Needle v. New York Railways Corp., 227 App. Div. 276	18
People v. Robinson, 273 N. Y. 438	18
Roge v. Valentine, 255 App. Div. 475	18
reversed 280 N. Y. 268	18
Sibbach v. Wilson & Co., 61 S. Ct. 422	20
Sprencel v. United States, 47 F. (2d) 501	15
United States v. Chandler, 87 F. (2d) 356	2, 19
United States v. Wescoat, 49 F. (2d) 193	15

STATUTES CITED.

Conformity Act (28 U. S. C. §724)	2, 20
Federal Rule 43(a)	20
Federal Statute (28 U. S. C. §695)	12, 15, 18, 19, 20
(38 U. S. C. §11-g)	14
Judicial Code §837	16
New York Civil Practice Act §374-a	12, 13, 15, 18
Regulations of United States Public Health Service, promulgated June 18, 1931, §521	13

Supreme Court of the United States

OCTOBER TERM, 1940

LOUIS E. ULM, Petitioner, AGAINST MOORE-McCORMACK LINES, INC., Respondent.	No. 850

MEMORANDUM IN OPPOSITION TO THE PETITION FOR CERTIORARI.

Preliminary Note.

The facts disclosed by the record in this case, as well as the matters decided by the Circuit Court of Appeals, differ materially from what is said of them by the petitioner.

Analysis of the evidence leaves no room for doubt that the judgment of the district court was obtained by dissimulation and fraud, and that the errors committed during the trial could not in justice have been ignored by the Circuit Court of Appeals.

As the court said in denying the petitioner's motion for a rehearing (Judge Charles E. Clark writing with the concurrence of Judges Swan and Chase):

> "* * * we thought a new trial necessary not only because of the exclusion of the hospital records, but also because of undue restriction of cross-examination —each involving the same vital issue of the nature or existence of plaintiff's personal injuries, and hence not only their extent, but also whether he had been injured at all." (R. 546.)

Contrary to the assertion made on page 2 and elsewhere in the petition for certiorari, the first specified ground of reversal, the exclusion of certain clearly identified original records of the United States Marine Hospital at Stapleton, containing *"the observations of the admitting doctors that plaintiff showed no external injury after the alleged accident"* (C. C. A., R. 546), is not opposed to the decision of the New York Court of Appeals in *Johnson* v. *Lutz,* 253 N. Y. 124, but is directly supported by the more recent decision in *Budka* v. *City of Schenectady,* 256 App. Div. 764, which was not called to the attention of the Circuit Court of Appeals: pages 13 and 16, *infra.*

There is not even remotely involved any question respecting the Constitution, or the Conformity Act (28 U. S. C. § 724), or the decisions of this court cited on page 2 of the petition; nor is there any color of conflict between the decision below and the Fifth Circuit decision in *United States* v. *Chandler,* 87 F. (2d) 356, as the petitioner has represented on page 5 of the petition: page 19, *infra.*

The second specified ground of reversal, the undue restriction of the respondent's right of cross-examination, is not mentioned in the petition itself, and is incorrectly referred to in the supporting brief: pages 7-10, *infra.*

The asserted "questions presented", and the reasons advanced by the petitioner for the allowance of a writ, are fundamentally non-existent: page 16, *infra.*

The Facts.

There is so much difference between the facts themselves and the version of them given in the petition that a restatement is necessary.

On a trial before Judge Mandelbaum and a jury, in the southern district of New York, the petitioner, an occasional seaman who had been a few days in the respondent's employ, recovered a verdict for $35,000, of which $10,000 was for maintenance and cure, on account of alleged per-

sonal injuries. With the petitioner's consent, the $10,000 award was reduced to $3,000, and judgment was entered for $28,000, with interest and costs.

The petitioner's alleged injuries consisted *mainly* of *an asserted concussion of the brain,* which was the purported cause of tremors, twitchings of the face and eyelids, and other manifestations of nervous affliction that were displayed by the petitioner during the trial (R. 304).

Respondent had not previously suspected that the petitioner was a drug addict, and did not succeed in confirming the fact until near the close of the case. Respondent promptly brought its information on the subject to the attention of the trial judge by affidavit, and requested an adjournment or a mistrial to obtain the testimony of a physician in the United States Public Health Service (then in San Francisco) to whom the petitioner had disclosed his addiction to morphine about two weeks before the date of the alleged accident in suit (R. 447 at 451; *cf.* R. 420). The denial of the motion for an adjournment or a mistrial was assigned as error (R. 506), but it was not specifically mentioned by the Circuit Court of Appeals and is only of incidental interest here.

Regarding the alleged accident, it was testified by the petitioner alone, with a little circumstantial corroboration, that he had fallen down a ladder leading to the crew's quarters on the respondent's vessel. The asserted accident happened early Christmas morning, 1939, while the vessel was moored to a dock at Staten Island and the petitioner was off duty. Many of the particulars are either ignored or wrongly set out in the petition, but since the Circuit Court of Appeals has held that the evidence was sufficient to justify the submission of the issues to the jury, there is no point now in discussing that phase of the case. It may be mentioned, however, as was intimated by the Circuit Court of Appeals in the light of the whole case, that the actual occurrence of an accident, of any injury to

the petitioner, is at least open to grave doubt (R. 546, first paragraph; R. 549, last paragraph).

The Controlling Factual Considerations.

So far as they are material at this time, the essential facts are that the petitioner's purported affliction, his appalling tremors, "the twitching of his face and body" (R. 304; *cf.* R. 170), were represented to be the result of a severe blow on the head (R. 264-5), followed by a long period of unconsciousness (R. 282),—each of those occurrences being testified to by the petitioner *alone*. Except for his own statements on the subject, made to physicians and to the jury, there was *no* evidence,—or *at most* a wavering scintilla,—to show that the petitioner had ever received any blow on the head, or that he had ever been unconscious for so much as a moment on the occasion of his alleged fall. Not only was he a man of negligible credibility, but he was contradicted on those crucial points by several witnesses (cf. R. 330; R. 377), including an ambulance doctor from a private hospital who was summoned immediately but who could find nothing wrong with the petitioner (R. 364).

Petitioner nevertheless was treated with all of the consideration that should be accorded a man who claims to have been seriously hurt, and later in the morning, before the vessel sailed, he was ceremoniously removed from his bunk in a stretcher and taken by an ambulance to the United States Marine Hospital at Stapleton. Of all that, and of the first part of his hospitalization, the petitioner testified that he was almost entirely unconscious (R. 150-152).

The Grounds of Reversal.

I.

"The two Stapleton records are the vitally important ones, for they contain the observations of the admitting doctors that plaintiff [petitioner] showed no external injury after the alleged accident." (Opinion of C. C. A., R. 546.)

Clinical examination of the petitioner upon his admission to the United States Marine Hospital at Stapleton affirmatively disclosed that notwithstanding his story of a severe blow on the head, there was not a single contusion, bruise, bump, swelling or other external mark or sign of such a blow; and it was explicitly recorded by Doctor Beardsley, the physician who conducted the admission examination, that the petitioner,—though "admitted on a stretcher,"—"does not appear acutely ill"; "ears, nose and mouth negative; no cervical lymphadenopathy" (Ex. G id.).

The exclusion of Doctor Beardsley's admission notes, which were a part of the clinical record of the United States Marine Hospital at Stapleton, and the exclusion of remainder of the clinical record covering the period of the petitioner's first hospitalization there, were among the first specified grounds of reversal (R. 531). In view of statements in the petition that are either unfounded in fact or have been made in disregard of other facts not mentioned in the petition, the authenticity of those records will be described.

Upon the examination of petitioner's first and most impressive medical witness, Doctor Rawlings, an interne from the Stapleton Marine Hospital, petitioner's counsel referred to the "hospital records" in front of the witness and had him identify the admission notes as having been made by Doctor Beardsley. [As is obvious from the colloquy at R. 267-268, respondent's counsel had not then in-

spected the records (*cf.* foot of R. 269), which were in court under the petitioner's subpoena (R. 318).] Petitioner then carefully established to the satisfaction of everybody present that Doctor Beardsley had been seriously ill for a long time and was unable to attend the trial (R. 267-268; R. 296).

The witness, Dr. Rawlings, did not see the petitioner until he sought readmission to the hospital on February 28, some *two months* after the alleged accident (R. 258); but, as a medical man of six months' experience, Doctor Rawlings described with vivid realism the tearing of the brain tissues, and the hemorrhages, which result immediately from a severe concussion of the brain (R. 265, 281), especially such a concussion as the one postulated by petitioner's counsel, a "very important" symptom of which was "that the man had been unconscious for several hours" (R. 282).

On cross-examination Doctor Rawlings swore that he had not thoroughly examined the clinical record of the petitioner's original admission to the hospital, which he testified was in Doctor Beardsley's handwriting (R. 278; R. 269); and when he was requested to read a page of it to the jury ["a page from the clinical record of his first appearance at the hospital"] the objection of petitioner's counsel was summarily sustained (R. 279). The trial court would not even permit the witness to testify whether he had ever ascertained if any bone or joint pathology was indicated by the X-rays, and petitioner's counsel immediately asserted that "no claim of that kind" was made (R. 279). [That would seem to take care of the flat assertion made on page 23 of the petition that the petitioner *then* had a fractured coccyx. No such condition was found by Doctor Kienzle, who examined the petitioner on the day after his first discharge from the hospital (R. 387-8).] A little later, the entire clinical record, which had been thoroughly identified by Doctor Rawlings (R. 276-279; 280), was offered in evidence by the respondent and was excluded (R. 321-322).

The circumstances in which the other United States Marine Hospital records were excluded from evidence are

referred to in the opinions of the Circuit Court of Appeals, except that in referring to the record of the Galveston hospital (Exhibit H for id.) the appellate court did not mention the recital in that record of the clinical observation that the petitioner had been found under the influence of narcotics and had confessed his addiction to morphine (R. 448-9). (There had been an inexplicable delay in the delivery of that record to the courtroom under respondent's subpoena, *cf.* R. 273; 449.)

[There is no contention by the petitioner that the records were privileged, and if any basis for such a claim ever existed it was, of course, waived by his own evidence: *Hethier* v. *Johns,* 233 N. Y. 370; also there was an express waiver at the trial, R. 271.]

II.

Coming to the second specified ground of reversal, the undue restriction of the respondent's right of cross-examination, the appellate court cited one instance of prejudicial restriction, among several instances of which respondent had complained (R. 535, 546).

It has been mentioned that the first medical witness, Doctor Rawlings, had *not seen the petitioner during the period of his first hospitalization* (December 25, 1939, to February 13, 1940), or before February 28 (R. 269). [That was two weeks *after* he had successfully passed another employer's medical examination, as will be mentioned again, p. 8 *infra.*]. It should be noted also that the petitioner's *only* medical evidence for those 8 weeks was supplied by the petitioner's next witness, an unlicensed interne (R. 311), von Berthelsdorf, who *did not* make a physical examination of the petitioner (R. 295) and who did not even see the petitioner until he had been under drastic treatment for five days for his *purported* concussion (R. 294). Obviously the concussion treatment,—which is routine (R. 302),—was administered *upon the supposition that the petitioner was telling the truth regarding the asserted blow on his head*

and his asserted unconsciousness (cf. R. 283); it included heavy sedation, spinal tapping, intravenous injections, and dehydration to relieve a possible pressure on the brain (R. 297). But there never was in fact *any* increased pressure, or any other sign of abnormality, in the spinal tap! (R. 311-312). After the petitioner (who brought suit on the *second* day after this alleged accident, R. 187) had undergone the drastic treatment for a full week, he became cyanotic, from a cause that was never determined (R. 298), but the interne admitted that the condition could be reproduced by a sufficiently drastic dehydration alone (R. 313).

On cross-examination the trial court would not allow respondent to have the witness refer to the examination report or the prognosis made by the chief physician, Doctor Palmer (R. 295), showing what the petitioner's condition was found to be on his discharge from the hospital (R. 314-315); but *respondent* proved that on February 14th, the day following his discharge, the petitioner called at the office of a former employer to settle a claim, saying nothing of his alleged injury in suit and *giving a wholly false account of himself during the period while he was actually in the Stapleton hospital* (R. 288-291; cf. 171). On the same day he was given a physical and neurological examination by the former employer's physician, who had also examined the petitioner two years earlier, and who knew nothing of the alleged accident in suit, and who found the petitioner *to be normal and fit for duty* (R. 380-1; 387-8 and cf. 170).

On February 28th, the petitioner reappeared at the Stapleton Marine Hospital, and Doctor Rawlings, petitioner's leading medical witness, testified that he then took the petitioner's history of his fall and subsequent ailments from the petitioner's own lips (R. 259), without troubling to look at his former clinical record (R. 278). It was quite a history (cf. R. 282). Doctor Rawlings scrupulously recorded the petitioner's story,—his stricken head, his prolonged unconsciousness, and the item of *a broken nose* (R.

259). In addition to the petitioner's history and his subjective complaints, and a "tremor" [another government hospital had recorded his "tremors" long before the alleged accident, but the petitioner himself testified that *those* were alcoholic tremors (foot of R. 194)], Doctor Rawlings recorded also that the petitioner had a "*deviated nasal septum*" (R. 260), which—he expertly testified—could "competently" have been produced by a fractured nose occasioned by the petitioner's hypothetical fall, as the witness led the jury to believe *was* actually its cause (R. 263; cf. 271).

Now, *that deviated nasal septum*,—testified to have been seen by Doctor Rawlings,—*was the only evidence in the whole case*, except for the petitioner's bare assertion, tending to prove that there had *ever existed any visible mark of injury to the petitioner's head* (or to any other part of his body, for that matter). The evidence was of enormous importance to the petitioner, and all of its intended implications were demonstrably false. This the respondent undertook to show upon cross-examination by handing the witness an abstract of the petitioner's clinical record at the U. S. Marine Hospital at Galveston, where the petitioner had been a patient until a few days before he came aboard the respondent's vessel. It was an official abstract, under seal of the U. S. Public Health Service, and it recited, among the clinical findings made there (several weeks *before* the alleged accident), *a deviation of the petitioner's nasal septum* (Ex. D for id.). The trial court, however, would not permit respondent's counsel even to have the witness admit that he *observed* any recitation to that effect in the official abstract, or to answer other questions fairly intended to show that the witness could not honestly have credited the deviated nasal septum to the incident described in his own record if the abstract had been before him when he took the petitioner's history (R. 271-272).

The last mentioned episode was cited to illustrate the second specified ground of reversal (R. 535; 546). Its

sufficiency seems plain for the reason given in the opinion below (R. 535), to say nothing of the further reason that the respondent had the right to elicit by those questions that the witness was either absurdly credulous or was not disinterested in the result of the litigation. Apart from the factual recitations in the abstract (as to which the abstract was not even offered in evidence: Ex. D. for Id.), it may be supposed that mere knowledge of the existence of the paper itself, certified by his own Department and bearing its seal (R. 272) would have been of considerable interest to a commissioned officer of the U. S. Public Health Service who had given the testimony that Doctor Rawlings gave in this case.

III.

Inasmuch as the petitioner presses on this court, as he urged in the Circuit Court of Appeals, that he has the preferred status of a mariner, it may be pointed out explicitly that his case is in no respect meritorious.

On March 16, 1940, the petitioner was examined at the request of respondent's counsel by Dr. Beverley Chaney, the attending neurologist of the New York Neurological Institute, who testified that even assuming the correctness of the petitioner's own story, the petitioner had no sign of organic injury, but was either hysterical or was malingering (R. 402, 405). Shortly before the trial, the petitioner was directed by Judge Conger (in motion part) to submit to a further examination by Doctor Chaney (R. 102); but when (after evasions, R. 129) he finally presented himself to the doctor, his counsel refused to permit an oral examination,—designed to determine whether the petitioner was in fact malingering or had hysteria. Judge Conger thereupon directed that the matter of enforcing his order or modifying it be left to the trial judge, as the latter was advised by affidavit (R. 128 at 130). The trial judge, although at first reserving decision (see top R. 137), subsequently denied the respondent's application (cf. foot of R. 450).

Late in the trial, the appearance of the witness having been postponed, it developed that while the petitioner was avoiding examination by Doctor Chaney, his counsel had procured his examination by Dr. William Sharpe, a neurologist, who testified that *he* had found, a few days before, in addition to abnormally contracted pupils (not theretofore mentioned by anybody), certain neurological signs which indicated to him, on the basis of the petitioner's asserted history, the presence of organic brain injury (R. 336-7). There was not a particle of evidence as to the presence of such neurological signs at any former time, and there was affirmative evidence of their previous absence (R. 388-9; 403-4). When Doctor Sharpe gave his astonishing testimony the respondent had no information whatever that the petitioner was a drug addict. Apart from his appearance during the trial [from which *respondent* had illadvisedly obtained the exclusion of every witness not testifying, R. 132-3], there was no telling indication of the fact of his addiction until the original clinical record of the U. S. Marine Hospital at Galveston, where the petitioner had been a patient until shortly before he joined the respondent's vessel, in December, 1939, was delivered in the courtroom in response to a subpoena that had been issued before the trial (see R. 449). Respondent had obtained before the trial, and had undertaken to use on the cross-examination of Doctor Rawlings, as above described, a certified *abstract* of the Galveston clinical record (Ex. D for id.). The abstract does not disclose, or contain any intimation, that the petitioner was addicted to narcotics. Respondent's last witness, Doctor Chaney, was already on the witness stand when the Galveston clinical record was delivered. Doctor Chaney, whose qualifications are beyond controversy (R. 401), testified that abnormal neurological signs such as those described by Doctor Sharpe may be induced by the administration of certain drugs, including morphine (R. 416). [The word "headache" in the ninth line from the bottom of page 416 is contextually wrong: the word used was "hashish".]

It does not deserve to be overlooked either, as was proved on the trial, that a few years before this alleged accident the petitioner, as a recidivous felon, was examined by psychiatrists of the Massachusetts Department of Mental Health, and that his present counsel has suggested that the diagnosis which he obtained *then*, of probable epilepsy and psycho-neurosis, was the result of the petitioner's skill in deception (R. 396-7). It is abundantly disclosed by the record also that the petitioner had a long history of dishonesty and violence (R. 160-163; 401); that he committed perjury in this case (foot of R. 176; cf. R. 21, 83-84, 87-88); and that throughout the trial he demonstrated his complete indifference to the subject of his own truthfulness with respect to the matters involved in this litigation (R. 171-4).

Decision of Circuit Court of Appeals.

The Circuit Court of Appeals placed the admissibility of the marine hospital records on the Federal statute, 28 U. S. C. § 695, which, as pointed out in the opinion, was enacted in 1936 and is derived from the same source as the comparable New York statute of 1928, § 374a of the Civil Practice Act,—viz., the model act proposed by the Commonwealth Fund in 1927. (R. 532.) The opinion noted that Wigmore and other commentators have deplored the restrictive interpretation that was placed upon § 374a of the New York Civil Practice Act in certain cases, which were cited; and the court, by way of contrast, referred to the broad interpretation which the Circuit Court of Appeals itself had placed upon the Federal statute in the earlier case of *Hunter* v. *Derby Foods, Inc.*, 2 Cir., 110 F. (2d) 970, mentioning that state court precedents *might* have cast doubt on the conclusion reached in *that* case. But no similar doubt was intimated, or does any ground for it exist, with respect to the conclusion reached in the *present* case. As the court said in this case (R. 533):

> "But whatever should be the judicial attitude toward this statute, we do not think the cited New York

cases are in point on the immediate issue here. They did not involve the problem of identification, but only whether or not opinion statements of a doctor and of a policeman contained in official or business records were admissible. Here the records were claimed primarily to show direct observations made by attending physicians, not entries of opinions."

Direct authority on the construction of C. P. A. §374-a may be found in the recent case of *Budka* v. *City of Schenectady*, 256 App. Div. 764. That was an action to recover damages for personal injuries alleged to have been sustained by an infant who was claimed to have been rendered idiotic in consequence of an alleged accident. It was distinctly held to be error to exclude the records of the hospital where the infant plaintiff had been born, the Appellate Division pointing out that *the records were admissible under Section 374-a of the Civil Practice Act.* The error was regarded as immaterial, however, inasmuch as all of the relevant facts had been developed through the examination of the physicians.

Plaintiff's technical contention before the Circuit Court of Appeals that it was not shown to be *usual* for the United States Marine Hospitals to keep clinical records, was dealt with by the Circuit Court of Appeals in denying the petitioner's motion for a reargument (R. 548-549); but the fact that marine hospital records are *required by law* to be kept had been expressly pointed out in the district court (R. 413), and it may be mentioned that the published Regulations of the United States Public Health Service, promulgated June 18, 1931, under various Acts of Congress cited on the title page, provide:

"521. Clinical records of all cases will be begun as soon as practicable after admission. They must show an accurate and concise record of the patient's past history, condition on admission, daily notes upon condition and treatment while in the hospital on all cases requiring daily notes, and at least once weekly on all others."

The original clinical records of the United States Marine Hospital, at least the Stapleton records, which were most thoroughly identified, were admissible on many grounds.

Independently of statute, the clinical records of government hospitals have been admitted in evidence by the Federal courts for many years.

In the ninth circuit case of *The Andrea F. Luckenbach* (1935), 78 F. (2d) 827, it was said:

> "Counsel assigned as error the admission of certain hospital records kept by the United States Public Health Service. These records were properly admissible. *United States* v. *Harbanuk* (C. C. A.) 62 F. (2d) 759; Rev. St. §882, amended June 19, 1934, 48 Stat. 1109, 28 USCA § 661."

Although that was an admiralty case, the application of the quoted observation was not restricted to admiralty cases, and *no reported decision has been found* in which the clinical records of a Marine Hospital have been held to be inadmissible.

The clinical records of Veterans' Hospitals have been held to be admissible, and the intimation on page 17 of the petition that authority for their admission was specifically found in 38 U. S. C. § 11-g is incorrect, the statute last cited not having been enacted until 1936, subsequent to the date of the three following decisions:

Long v. *United States,* 59 F. (2d) 602, at 604, 4th Cir., where the stated reasons for admitting such records included the following:

> "The examining physicians of the government examine hundreds of disabled soldiers. The written record of an examination made at the time is undoubtedly more trustworthy than the treacherous memory of a busy man dealing with many cases having many points of similarity. It is clear, therefore, not only that it is necessary as a practical matter that these reports be

received if evidence is to be had of the matters to which they relate, but also that they are more dependable than would be the oral testimony of the witnesses who made them, and are, in reality, the best evidence obtainable as to such matters.

* * * * *

"And the reports, in so far as they relate to the observations and diagnoses of the examining physicians, are admissible on the further ground that they are public records made and preserved by public officials in discharge of duties imposed upon them by law."

Sprencel v. *United States,* 5th Cir., 47 F. (2d) 501, top of 507, right-hand column;
United States v. *Wescoat,* 4th Cir., 49 F. (2d) 193.

In numerous other cases the Federal courts have consistently held that records made by public officers in pursuance of a specific public duty are admissible in evidence without the necessity of calling the persons who made the entries. (*Chesapeake & Deleware Canal Co.* v. *U. S.,* 250 U. S. 123, 128-9; affirming 3rd Cir., 240 Fed. 903; and cf. *Evanston* v. *Gunn,* 99 U. S. 660; *Gillmore* v. *United States,* 93 F. (2d) 774).

In New York and most of the other states having statutes comparable to 28 U. S. C. § 695,—e. g. § 374-a of the New York Civil Practice Act, the *clinical* records of any hospital, public or private, are freely admitted (*Budka* v. *City of Schenectady,* 256 App. Div. 764, at 766; *Borucki* v. *MacKenzie Brothers Co.,* 125 Conn. 92), and the *only portions of hospital records that have been excluded* by the New York courts were extraneous recitals, such as the statement of an unidentified person who had proclaimed himself to be a bystander, and whose assertion, appearing among the hospital records, respected something that took place before the hospitalization began (*Geroeami* v. *Fancy Fruit and Produce Corp.,* 249 App. Div. 221, discussed

below). The *clinical records* themselves,—the reports of the examinations, and the observations of the physicians,—have been generally admitted in most states, as was noted by the Circuit Court of Appeals (R. 549).

The purported questions presented are without substance.

Taking the questions that are claimed on pages 4 and 5 of the petition to be presented by this record, the first is non-existent (p. 13 *supra; infra,* this page); the second is wholly unsubstantial, because as the Circuit Court of Appeals has expressly pointed out all of the errors on which reversal was based related to the "vital issue of the nature or existence of plaintiff's personal injuries, and hence not only their extent but also whether he had been injured at all" (R. 546); and the third is utterly without foundation, because there has been no order or direction for the prepayment of costs, or for the giving of security, nor has there been any other thing done or suggested in this case which does or might involve an interpretation of §837 of the Judicial Code, or an application of any decision of this court construing that section.

The reasons asserted in the petition (pages 5 and 6) for the allowance of a writ do not exist.

I.

As the Circuit Court of Appeals said, the New York cases cited by the petitioner are not in point. Although the petitioner has submitted no analysis of any of them, they will be discussed in detail. In none of them was a *physician's* observation involved.

Taking first the case of *Johnson* v. *Lutz,* 253 N. Y. 124, erroneously cited by the petitioner as repugnant to the

decision below, the rejected document (a police blotter) was thus described by the New York Court of Appeals (pp. 127-8):

> "The memorandum in question was not made in the regular course of any business, profession, occupation or calling. The policeman who made it was not present at the time of the accident. The memorandum was made from hearsay statements of third persons who happened to be present at the scene of the accident when he arrived. It does not appear whether they saw the accident and stated to him what they knew, or stated what some other persons had told them.
>
> "The purpose of the Legislature in enacting section 374-a was to permit a writing or record, made in the regular course of business, to be received in evidence without the necessity of calling as witnesses all of the persons who had any part in making it, *provided the record was made as a part of the duty of the person making it, or on information imparted by persons who were under a duty to impart such information.* * * * It [Section 374a of the Civil Practice Act] was not intended to permit the receipt in evidence of entries based upon voluntary hearsay statements *made by third parties not engaged in the business or under any duty in relation thereto.*" (Our italics.)

In *Geroeami* v. *Fancy Fruit and Produce Corp.*, 249 App. Div. 221, a hospital physician had recorded, on the basis of information furnished by an unidentified person who claimed to have been a bystander, that the plaintiff was intoxicated when struck by the defendant's automobile; but the physician himself testified that the plaintiff was not intoxicated upon his admission to the hospital, about 25 minutes after the accident. The Appellate Division found that "there was no evidence whatever tending to establish the plaintiff was intoxicated," and that the person who had supplied the information, which the physician testified positively that he discovered to be false, "was not identified and, so far as appears, did not witness the

accident. Nor was it shown that the information came from one under a duty to impart it." Considering that the jury might have regarded the discredited recitation, which stood alone, as sufficient proof of the defendant's wholly baseless contention that the plaintiff was intoxicated, the Appellate Division directed a new trial.

In *Needle* v. *New York Railways Corp.*, 227 App. Div. 276, the rejected evidence was a police blotter based on statements made to a policeman who had not seen the alleged accident.

> The statements "made to the policeman, upon which he based his report, were not made by any person in the regular course of any business, but on the contrary, the report of the policeman was made upon the irresponsible gossip of by-standers and the even more unreliable conclusion of the interested motorman who * * * had every reason to give a biased and false report."

People v. *Robinson*, 273 N. Y. 438, cited by petitioner, was a criminal case, and the only reference to §374a is on page 446, where it was remarked that a notation on a check stub would not have been admissible against the defendant under that section, or unless made by the defendant or with his knowledge, a matter that was uncertain.

Petitioner has also cited *Roge* v. *Valentine*, 255 App. Div. 475, a proceeding for the removal of a policeman. The cited decision was reversed by the Court of Appeals in 280 N. Y. 268. There some entries appeared on the record cards and check stubs of a disbarred lawyer.

> "The persons who made the notations, testifying as witnesses for the prosecution to establish the reliability of notations they have made, have in fact completely demonstrated their lack of probative force as independent affirmative evidence." (280 N. Y. at 278.)

II.

Contrary to the petitioner's assertion, there is no conflict whatever between the decision below and the Fifth Circuit decision in *United States* v. *Chandler,* 87 F. (2d) 356.

In the first place, *it does not appear that 28 U. S. C. §695 had been enacted* at the time the *Chandler* case was tried, and that statute, enacted June 20, 1936, is not even mentioned in the appellate court's opinion, which is dated January 8, 1937.

In the second place, the appellate court expressly noted in that case, without reference to any statute, that the trial court had actually admitted a part of the hospital records and that the rest were excluded because "*it was not shown that they were the originals and* [*they*] *were not certified as copies.*" Even with respect to that ruling,—which occurred upon the *second* trial of the case [*cf.* 77 F. (2d) 452]—the appellate court observed that in the circumstances of that case the excluded records would have been "at best" cumulative evidence, and concluded (87 F. (2d) at 357):

> "Conceding that government records or certified copies of them may be introduced in evidence, it is necessary that they be properly authenticated. We consider the ruling of the District Court was right. If we be mistaken in this, we consider the ruling was harmless."

That is the decision which is represented on page 5 of the petition to be "*directly*" in conflict with the decision below "*on the interpretation of the identical Federal statute.*" In fact that decision supports the view that the original records here involved are admissible on principles that were generally recognized long before 28 U. S. C. § 695 was adopted.

III.

Contrary to the petitioner's assertion, nothing in this case involves a consideration of the Conformity Act (28 U. S. C. §724). If there actually were a difference between a rule of evidence applied by a local court and the one generally obtaining in the federal courts, it would be resolved in any case by the application of whichever rule favored the reception of the proffered evidence. [Federal Rule 43(a).] That was made plain in both of the opinions delivered in *Sibbach* v. *Wilson & Co.*, Jan. 13, 1941; 61 S. Ct. 422. But, as already noted, and as the Circuit Court of Appeals has pointed out (R. 533), no difference between a state rule of evidence and a Federal rule of evidence exists in this case.

IV and V.

Petitioner's asseverations that 28 U. S. C. §695 has been erroneously interpreted are utterly without support. No different interpretation by *any* court has been cited; the same interpretation has been put upon the comparable New York statute; and the admissibility of the records in question, entirely independently of statute, is sustained by the great weight of authority, state and Federal.

CONCLUSION.

It is respectfully submitted that there is nothing in this case to warrant its review by this court.

JOHN C. CRAWLEY,
for the Respondent.

New York, April 4, 1941.